IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, STANFORD CAPITAL MANAGEMENT, LLC, R. ALLEN STANFORD, JAMES M. DAVIS, and LAURA PENDERGEST-HOLT, Defendants.	§ § § § § § § § § § § § § § §	CASE NO. 3-09-CV0298-N

UNDERWRITERS' RESPONSE TO RECEIVER'S MOTION TO ENFORCE RECEIVERSHIP ORDER AND, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT

Certain Underwriters at Lloyd's of London and Arch Specialty Insurance Company (collectively, "Underwriters") file this response to Receiver Ralph S. Janvey's Motion to Enforce Receivership Order and, in the Alternative, for Protective Order, and respectfully show the Court as follows.

Preliminary Statement

Karyl Van Tassel is a fact witness with knowledge relevant to the insurance coverage dispute between Underwriters and former Stanford executives Allen Stanford, Laura Pendergest-Holt, Gilbert Lopez, and Mark Kuhrt (the "Executives") that currently is pending in the Southern District of Texas (the "Coverage Action").[1] This Court permitted the Coverage Action to go

[1] *Laura Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, No. 4:09-CV-03712 (S.D. Tex. Nov. 17, 2010) (hereinafter, "Holt v. Underwriters").

forward in the Southern District and the Fifth Circuit has now mandated that the coverage dispute must be resolved expeditiously in the Southern District.

Underwriters have subpoenaed Ms. Van Tassel so that the parties to the Coverage Action have an opportunity to learn about the *facts* underlying conclusions that Ms. Van Tassel made publicly available more than a year ago concerning the Executives' purported Ponzi scheme. Those conclusions are directly relevant to Underwriters' contention that the Executives engaged in acts of Money Laundering, which precludes coverage under the insurance policies. The facts known to Ms. Van Tassel are likely to be used as evidence in the Coverage Action. Courts have held that, in circumstances like these, private litigants are permitted to depose an expert to learn about the facts underlying his or her conclusions in order to assess the validity of those conclusions.

Underwriters' subpoena of Ms. Van Tassel does not violate the Receivership Order. Although Paragraph 9(a) of the Receivership Order enjoins the "commencement or continuation" of litigation against the "Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate," it does not, and cannot reasonably be interpreted to, enjoin persons from taking *depositions* of any of these individuals in the course of litigation that this Court has explicitly permitted to go forward. Such an interpretation of Paragraph 9(a) would thwart the orderly and efficient resolution of the Coverage Action, because the parties to that action would have to seek leave of this Court before they could take virtually all of the currently planned depositions in that case. This Court never disclosed that intention when it expressly permitted the Coverage Action to proceed in the Southern District.

Finally, contrary to the Receiver's assertion, Underwriters subpoena of Ms. Van Tassel does not violate Rule 26(b)(4). The Receiver has not retained Ms. Van Tassel as an expert in

anticipation of litigation with Underwriters. In fact, the Receiver admits that Ms. Van Tassel has never investigated or analyzed the insurance policies or coverage matters at issue in the litigation between Underwriters and the Receiver. In any event, Underwriters have subpoenaed Ms. Van Tassel as a fact witness in the Coverage Action and not in her capacity as an expert witness in this or any other case.

I. FACTUAL BACKGROUND

Underwriters initially agreed, subject to a complete reservation of rights, to reimburse the Executives' reasonable and necessary defense costs arising from proceedings initiated against them by the DOJ (the "Criminal Action") and the SEC (the "SEC Action") for purportedly operating a multi-billion dollar Ponzi scheme. In their reservation of rights letters, Underwriters noted that the D&O Policy excludes claims "arising directly or indirectly as a result of or in connection with any act or acts (or alleged act or acts) of Money Laundering."[2] The D&O Policy's definition of Money Laundering broadly includes, among other things, obtaining investor funds through criminal conduct.[3]

Subsequently, on November 16, 2009, Underwriters informed the Executives that they would no longer provide coverage because they had determined, based on substantial evidence, that the Executives engaged in acts of Money Laundering. This evidence included, among other things, the sworn declaration of accounting expert Karyl Van Tassel. The Receiver had retained Ms. Van Tassel to conduct a forensic accounting analysis of the Stanford Entities' records. In her sworn declaration, she concluded that the proceeds from the sales of new SIB CDs were used to make CD interest and redemption payments to existing investors, as well as to pay commissions,

[2] *See* D&O Policy Art. IV, cl. T.

[3] *See* D&O Policy Art. III, cl. I.

pay bonuses, and make loans to Stanford financial advisors—in short, Ms. Van Tassel concluded that the Executives had operated a classic Ponzi scheme.[4]

On November 17, 2009, the Executives filed a declaratory judgment action against Underwriters in the Southern District of Texas seeking a preliminary injunction requiring Underwriters to continue paying their defense costs arising from the Criminal and SEC Actions.[5] That lawsuit also claims that Underwriters acted unreasonably and in bad faith in its actions in cutting off coverage to the Executives. The Underwriters relied in part on the conclusions publically stated by Ms. Van Tassel in order to reach the conclusions which are now under attack as having been made in bad faith in the very action which this Court (and now, the Fifth Circuit) permitted to go forward in the Southern District. Underwriters moved this Court to enjoin the Coverage Action because it violated this Court's prior orders, which barred Allen Stanford and anyone acting in concert with him from seeking relief outside of the Northern District relating to the Policies. On December 16, 2010, this Court recognized that the Executives had violated its prior orders but permitted the Coverage Action to proceed in the Southern District.[6] However, this Court gave no indication that the Underwriters would face unusual hurdles in defending this action (initiated by the Executives) because the Southern District would not control discovery in the case.

On January 26, 2010, the Southern District granted the Executives' request for a preliminary injunction and ordered Underwriters to continue paying the Executives' defense costs for the Criminal and SEC Actions until there was a final determination of Money

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[4] *See* Appendix in Support of Receiver's Motion for Order Freezing Assets Held in the Names of Certain Relief Defendants and for Summary Judgment and Brief in Support Thereof, *SEC v. Stanford Int'l Bank, Ltd.*, No. 3:09-CV-0298 (N.D. Tex. Feb 17, 2009) (hereinafter, "SEC v. SIB").

[5] Complaint, *Holt v. Underwriters* (S.D. Tex. Nov. 17, 2009).

[6] December 16 Order, *SEC v. SIB* (N.D. Tex. Dec. 16, 2009).

Laundering in the underlying proceedings.[7] In granting the preliminary injunction, the Southern District refused to consider Underwriters' evidence of Money Laundering based on an erroneous application of Texas' eight-corners rule. Underwriters immediately appealed that decision.

On appeal, the Fifth Circuit remanded the Coverage Action to the Southern District to consider all admissible evidence and to determine on an expedited basis whether the Executives engaged in acts of Money Laundering.[8] When the Fifth Circuit instructed the Southern District to resolve the coverage dispute expeditiously, there had been no indication from this Court that there were going to be unusual procedural requirements impeding discovery in the Coverage Action. Consistent with the Fifth Circuit's mandate, the Honorable Nancy F. Atlas, who is now presiding over the Coverage Action, set an evidentiary hearing for August 27, 2010 and an expedited discovery deadline for August 2, 2010. Because Ms. Van Tassel's conclusions, and the facts underlying those conclusions, are relevant to the August hearing as well as to the issues of reasonableness and bad faith, Underwriters issued a subpoena for her deposition.

II. ARGUMENT AND AUTHORITIES

A. Ms. Van Tassel is a Fact Witness and Underwriters Have a Right to Take Her Deposition in the Coverage Action.[9]

Underwriters are entitled to take Ms. Van Tassel's deposition in the Coverage Action pursuant to Federal Rule of Civil Procedure 26(b)(1), which provides that litigants may obtain discovery regarding "any non-privileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). Relevant information for discovery purposes includes any information "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Ms. Van Tassel's

[7] January 26 Order, *Holt v. Underwriters* (S.D. Tex. Jan. 26, 2010).

[8] Fifth Circuit Opinion, *Holt v. Underwriters* (S.D. Tex. March 30, 2010).

[9] To the extent the Receiver or Ms. Van Tassel have any objections to Ms. Van Tassel's deposition that are not related to the Receivership Order, including the scope of her deposition, they should be required to raise those objections to Judge Atlas, who is presiding over the Coverage Action.

conclusions that, in effect, the Stanford Entities operated as a Ponzi scheme are directly relevant to Underwriters' claim that the Executives engaged in acts of Money Laundering. The Receiver does not suggest otherwise; rather, he contends that Ms. Van Tassel cannot be subpoenaed to testify because she is an expert and private litigants cannot compel expert testimony.

However, Ms. Van Tassel is not being compelled to provide expert testimony in the Coverage Action. She has been subpoenaed as a fact witness to testify concerning the underlying facts that support the expert conclusions that *she already has made available to the public* (through her sworn declaration in a public filing) more than a year ago—facts that will be evidence in the Coverage Action.[10] Courts have held that private litigants can compel an expert to testify about facts underlying his or her conclusions in instances such as these. *See Wright v. Jeep Corporation*, 547 F. Supp. 871, 874 (E.D. Mich. 1982).

For example, in *Jeep Corporation*, the Eastern District of Michigan compelled an expert to testify in the course of litigation where he had not been retained by either party. *Id.* The expert previously had published a report that concluded that Jeep Corporation's utility vehicles experienced a disproportionately high roll over rate in accidents. *Id.* at 873. After Jeep Corporation was sued by a plaintiff who had been injured in a roll over accident, it subpoenaed the expert to learn about the facts underlying his report. *Id.* The expert refused to testify claiming, among other things, that he had no first hand knowledge of the accident in question and that because he had not been retained as an expert by either party to the litigation he could

[10] Contrary to the Receiver's claims, Underwriters are not trying to "hijack" Ms. Van Tassel's expert services or obtain her conclusions for "free." Ms. Van Tassel disclosed her conclusions and made her expert report available to the public *over a year ago*. Underwriters are taking Ms. Van Tassel's deposition simply to learn about the facts Ms. Van Tassel relied on in reaching those conclusions. Moreover, Underwriters are not, as the Receiver suggests, asking Ms. Van Tassel to produce a substantial volume of documents. Underwriters only have asked Ms. Van Tassel to produce work papers, notes, and other materials that she prepared or that were prepared for her in order to draft her expert report, as well as documents showing the materials she reviewed in connection with preparing that report. *See* Underwriters' Subpoena to Karyl Van Tassel, a true and correct copy of which is attached as Exhibit A to Receiver's Motion to Enforce Receivership Order [Docket No. 9].

not be compelled to provide his expert testimony. *Id.* However, the court recognized that the results of the expert's prior report likely would be used at trial by the plaintiff "either through the testimony of other experts or as a result of application of Fed.R.Evid. 803(18), and it is important for the parties to learn about the underlying facts to help the court judge the validity of the conclusions." *Id.* The court concluded that Jeep Corporation was "not requesting Professor Snyder to assist in explaining technical matters," but was requesting "that it have an opportunity to review the data underlying a study that is highly damaging and is likely to be offered in evidence against it. There is nothing in the federal rules that creates an exemption for the respondent from providing the relevant material requested." *Id.* at 874.

Similarly here, Ms. Van Tassel is not being compelled to explain any technical matters or otherwise provide expert testimony, but she has instead been subpoenaed so that Underwriters (and the Executives) have an opportunity to learn about the facts underlying her previously published conclusions, which will likely be offered as evidence in the Coverage Action. Discovery related to those facts is necessary so that the parties to the Coverage Action and Judge Atlas have an opportunity to assess the validity of Ms. Van Tassel's conclusions. There is nothing in the Federal Rules of Civil Procedure or common law that would exempt Ms. Van Tassel from providing the requested testimony. As the court in *Jeep Corporation* noted, "to maintain the system of justice used in this country, it is necessary that all relevant evidence be made available for the resolution of disputes." *Id.* at 873.

B. Underwriters' Subpoena Does Not Violate the Receivership Order.

Underwriters' subpoena of Ms. Van Tassel in the Coverage Action—which is proceeding with this Court's approval and the Fifth Circuit's mandate—does not violate the terms of the Receivership Order. The Receiver argues that Ms. Van Tassel's subpoena runs afoul of

Paragraph 9(a) of the Receivership Order, which enjoins all persons from the "commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceeding against the Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate . . . ."[11]

Although Paragraph 9(a) enjoins the "commencement or continuation" of litigation against the "Receiver, any of the defendants, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate," it does not, and cannot reasonably be interpreted to, enjoin all persons from *taking depositions* of any of these individuals in litigation *occurring with this Court's explicit authorization.* Such a strained reading of Paragraph 9(a) would severely hinder, if not entirely preclude, the orderly and efficient resolution of the Coverage Action. If Paragraph 9(a) of the Receivership Order enjoins "all persons" from taking depositions of "the Receiver, any of the defendants, the Receivership Estate, or any agent, officer or employee related to the Receivership Estate" in the Coverage Action, then neither Underwriters nor the Executives would be able to take the vast majority of the depositions currently planned in that proceeding without first seeking leave from this Court. Underwriters, for instance, would not even be able to take the depositions of the Executives themselves without first getting approval from this Court. Likewise, the Executives would not be able to take depositions of the 16 former Stanford employees[12] they are currently planning to depose.[13] This result would be inconsistent with the terms of the Receivership Order, with this Court's

[11] Amended Order Appointing Receiver ¶ 9(a), *SEC v. SIB* (S.D. Tex. March 12, 2009).

[12] This Court has held that Paragraph 9(a) of the Receivership Order applies to former Stanford employees. *See* March 8 Order, *SEC v. SIB* (S.D. Tex. March 8, 2010).

[13] *See* Emergency Motion for Continuance at 5, *Holt v. Underwriters* (S.D. Tex. May 19, 2010).

December 16 Order permitting the Coverage Action to proceed in the Southern District, and with the Fifth Circuit's mandate for the Coverage Action to proceed expeditiously.

Even if this Court were to construe Paragraph 9(a) as enjoining Underwriters (or the Executives) from taking Ms. Van Tassel's deposition—it should not—then the Court should permit the parties to proceed with her deposition based on "general equitable principals and in accordance with [this Court's] ancillary equitable jurisdiction." This Court permitted the Coverage Action to proceed in the Southern District, and the conclusions Ms. Van Tassel reached concerning the operations of the Stanford Entities are not only relevant to the that action but will likely be used as evidence in that proceeding. Both Underwriters and the Executives should have an opportunity to assess the validity of those conclusions by obtaining discovery concerning the underlying facts supporting those conclusions.

C. Underwriters' Subpoena of Ms. Van Tassel Does Not Violate Rule 26.

Finally, Underwriters have not circumvented the limitations of Rule 26 by issuing a subpoena to Ms. Van Tassel. Rule 26(b)(4) restricts the ability of a party to obtain discovery from an expert the opposing party has retained in anticipation of litigation. *See* FED R. CIV. P. 26(b)(4). However, the Receiver did not retain Ms. Van Tassel as an expert—nor was her sworn declaration prepared—in anticipation of litigation with Underwriters. In fact, the Receiver readily admits that Ms. Van Tassel has not investigated, analyzed, or formed any opinions concerning the insurance policies or coverage matters at issue in the litigation between Underwriters and the Receiver.[14] Regardless, as set forth above, Underwriters have subpoenaed Ms. Van Tassel as a fact witness in the Coverage Action and not in her capacity as an expert witness in this or any other case. To preclude Underwriters from deposing Ms. Van Tassel in the

[14] *See* Receiver's Motion to Enforce Receivership Order at 4 [Docket No. 9].

Coverage Action would be inconsistent with Federal Rules of Civil Procedure's broad allowance of discovery.

III. CONCLUSION

Underwriters respectfully request that this Court deny the Receiver's Motion and permit the Underwriters to go forward with their deposition of Ms. Van Tassel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document and has been served on all known counsel of record via the Court's electronic filing system this 20th day of June, 2010.

/s/ Barry A. Chasnoff
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